UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Nos. 99-1390, 99-1561

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DORSEY TRAILERS, INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA AND ITS LOCAL 1868, AFL-CIO, CLC

Intervenors

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ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

These cases are before the Court on the petition of Dorsey Trailers, Inc. ("the Company") to review an order of the National Labor Relations Board ("the Board") and the Board's cross-application for enforcement of its order. The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), as the Company transacts business

within this circuit. The Board's decision and order were issued on March 12, 1999, and are reported at 327 NLRB No. 155. (A 1663-1665.)[1] The Company filed its petition for review on March 24, 1999. (A 1695-1697.) The Board filed its cross-application for enforcement on April 29, 1999. Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) place no time limits on the filing of petitions for review or applications for enforcement of Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the portions of its order based on uncontested findings of violations.

2. Whether substantial evidence on the record as a whole supports the Board's findings that the strike beginning on June 26, 1995, was an unfair labor practice strike and that the Company therefore violated Section 8(a)(3) and (1) of the Act by failing to reinstate the strikers after their unconditional offer to return to work.

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[1] "A" references are to materials appearing at tabs 34 through 80 of the printed appendix. "Tr" references are to the transcript of the hearing before the administrative law judge; the transcript pages, appearing at tabs 1 through 33 of the appendix but not including the entire transcript, have not been renumbered in the appendix and are cited herein according to their original pagination. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

3. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1), (3), and (5) of the Act by transferring all bargaining unit work from its Northumberland, Pennsylvania, facility to its Cartersville, Georgia, facility in retaliation for the employees' protected strike activity and without bargaining to impasse with the Union.

4. Whether the Board acted within its broad remedial discretion in ordering the Company to reopen its Northumberland facility and reestablish its trailer manufacturing operations there.

STATEMENT OF THE CASE

On charges filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 1868, AFL-CIO, CLC ("the Union"), the Board's General Counsel issued a complaint alleging that the Company had violated Section 8(a)(1), (3), and (5) of the Act (29 U.S.C. § 158(a)(1), (3), and (5)). After a hearing, Administrative Law Judge George Aleman found, inter alia, that a strike by employees of the Company was an unfair labor practice strike; that the Company therefore violated Section 8(a)(3) and (1) of the Act by failing to reinstate the strikers after their unconditional offer to return to work; that the relocation of bargaining unit work from Pennsylvania to Georgia was a

mandatory subject of bargaining; that the Company violated Section 8(a)(5) and (1) of the Act by implementing the relocation without bargaining to impasse with the Union; and that the relocation was in retaliation for the employees' protected strike and therefore violated Section 8(a)(3) and (1) of the Act. He recommended that the Company be ordered, inter alia, to cease and desist from the unlawful conduct and take affirmative remedial action, including the reopening of the Northumberland, Pennsylvania, facility and resumption of trailer manufacturing operations there. (A 1490-1546.)

The Company filed exceptions to the administrative law judge's decision. (A 1548-1566.) The Board (Members Fox and Liebman; Member Hurtgen dissenting in part) affirmed the administrative law judge's findings and conclusions and adopted his recommended order. (A 1663-1665.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Events Prior to the Strike

The Company manufactured flatbed and dump trailers at its Northumberland, Pennsylvania, facility, whose employees the Union had represented since 1967. (A 1665-1666; Tr 686, A 1447, pars. 5(a-c), A 1462, par. V.) The parties' most recent contract was effective from March 4, 1992, until March 1, 1995. (A 1666; 1440.) In negotiations for that contract, the Union

made concessions because the Northumberland plant's operations had not been profitable. (A 1666; Tr 525-527.) However, by early 1995, the Northumberland plant was exceeding expectations with respect to production, efficiency, and profitability; the Company had invested more than $100,000 in the plant and planned to invest another $160,000 to improve its production capacity. In 1994, the Company had received the largest single order in the industry for flatbeds, and at the end of the year, it received an even larger order. (A 1666; Tr 527-528.)[2] The Company viewed the Northumberland plant as the best dump trailer plant in the industry, largely because of its highly skilled work force. (A 1666; Tr 687.) It expected 1995 to be a "banner year." (A 1666; Tr 536.) The Northumberland plant's net profits exceeded $200,000 in each of the first five months of 1995, and exceeded $1,500,000 for the first six months of that year. (A 1365.)

On February 1, 1995, the Company put into effect a new attendance policy under which employees could be discharged for fewer unexcused absences or tardies than under the old policy, and which reduced financial and other rewards to employees with

[2] The demand for dump trailers had exceeded the Company's production capacity by early 1993. As a result, the Company subcontracted the production of dump trailers to a Georgia firm. The Third Circuit ultimately found, contrary to the Board, that the subcontracting was not a mandatory subject of bargaining. Dorsey Trailers, Inc. v. NLRB, 134 F.3d 125, 132-133 (3d Cir. 1998).

good attendance and safety records. (A 1667-1668; Tr 314-316, A 1304-1311.) The Union demanded that the Company bargain about the new policy, but the Company refused. (A 1667; 785, 799.)

Negotiations for a new contract began on February 8, 1995. The Union asserted that the Company's improved financial situation should lead to increased wages and benefits. The Company stated that its main objectives were to gain the right to subcontract work and to require employees to work overtime. (A 1667; Tr 62, A 1367.)

At a February 23 bargaining session, the Company's chief spokesperson, Vice President for Human Resources Kenneth Sawyer, told the Union that Company President Marilyn Marks had instructed him that a provision for mandatory overtime was essential; that the Company was prepared to take a strike to achieve this goal; and that Marks had said she would shut the plant down if agreement could not be reached on subcontracting and mandatory overtime. (A 1668 & n.12; Tr 17-18, A 1379.)

On February 24, Sawyer said that the Company had to decide whether to keep the plant in Northumberland or move to the Southeast, where 60 percent of its business was; it wanted to keep a plant in the North, but it had been "handcuffed" for several years with respect to attempts to increase productivity, and if subcontracting was not allowed, the ultimate decision

would likely be to shut down the plant and move to another facility. (A 1669 & nn. 12-13; 994-995, 1381-1382.)

At a management meeting in February, Plant Manager Michael Gordy told supervisors that if the employees went on strike, the plant would close, and that this message should be disseminated to employees. At least two supervisors did so. (A 1679; Tr 124, 131, 134-136.) One of them, in addition to repeating Gordy's remarks at weekly meetings of the 60 to 65 employees under his supervision, told one employee in late February or early March that President Marks would close the plant because "she has no time to waste on you people negotiating a contract" and told three other employees that if they voted to strike, Marks said she would close the plant, and "that's not a threat, it's a promise, but you didn't hear it from me." (A 1678-1679; Tr 134-136, 399, 440.)

A third supervisor told one employee that if the employees voted to go on strike, Marks would "close this place down," and told another that the employees "are going to make us all lose our jobs." (A 1680; Tr 400, 440.)

At a meeting on February 25, the Union advised the employees that they would be eligible for state unemployment benefits during a strike only if it was considered an unfair labor practice strike. It referred to the unilateral implementation of the new attendance policy and the supervisors'

threats of plant closure as grounds for such a strike, and suggested that any further changes in terms and conditions of employment could be used to support a claim that a strike was over unfair labor practices. The employees voted to rely on these factors in calling any future strike. (A 1670; 1321-1323.)

At a meeting on June 24, the employees voted to strike on June 26 because of the conduct of the Company previously discussed on February 24 and subsequent conduct, including attempts to resolve grievances without the Union's involvement. The strike began on June 26; the striking employees carried picket signs reading "UNFAIR LABOR PRACTICE" and "LOCKED OUT." (A 1670; Tr 294; A 1282-1283.)

B. Negotiations During the Strike; the Company's Acquisition of the Cartersville Plant

The parties held 28 bargaining sessions before the strike began. (A 1367-1410.) In the ensuing three months, only three bargaining sessions were held, none of which lasted more than an hour. (A 1670-1671; 1410-1413.) At the first session, on July 6, the Company indicated that since it was weathering the strike, it would present more stringent contract proposals. (A 1670-1671; Tr 570.) At one of the meetings, Sawyer said that the strike was putting the future of the plant in jeopardy. (A 1671; Tr 607.) In a telephone conversation with the Union's chief negotiator in September, Sawyer said that if the strike

were not settled within a few days, "this thing is going to be taken out of our hands." (A 1671; Tr 607-609.)

Supervisor Keith Reader, who had previously told employees that the plant would close if they went on strike, told employee Yvette Derr on the eve of the strike that if the employees went on strike, "you won't be coming back to work." (A 1678; Tr 379.) In late August, Reader told her that if more people did not cross the picket line, there would be no jobs, and that the Company was purchasing a plant in Georgia. (A 1678; Tr 380.)

As a result of the strike, many of the Company's customers canceled orders, and its monthly losses during the strike were approximately equal to its monthly profits in the six months before the strike. (A 1671; Tr 689-691, 703, A 1365.) By letter dated August 4, Glenn Taylor, owner of Bankhead Enterprises, the firm to which the Company had subcontracted its production of dump trailers, notified Company President Marilyn Marks that he had sold his Cartersville, Georgia, trailer manufacturing business, but not the plant. (A 1670; Tr 715, A 900.) By letter dated August 4, Taylor informed Marks that the sale had occurred. (A 1670; 900.) Marks sent a copy of the letter to three of the Company's vice presidents. (A 1670; Tr 718, A 1303.)

On September 25, at a meeting attended by the three vice presidents and other top management officials, Marks advised

them that Taylor, in a telephone conversation, had expressed an interest in selling the Cartersville plant to the Company. (A 1671; Tr 542-546, 601-605.) Within a few days thereafter, Marks and Taylor reached agreement on such a sale. (A 1672-1673; Tr 696-697.) On October 5, Marks notified the Company's directors of the agreement. (A 1673; 1422.) Also on October 5, Jerry Owens, the Company's Director of Strategic Projects, sent a memo to all senior management officials, setting forth a schedule for the shutdown of the Northumberland plant, "contingent on the outcome of . . . bargaining with the [Union]." (A 1673; 1297-1302.)

C. Subsequent Negotiations and the Closing of the Northumberland Plant

On October 9, Company Vice President Sawyer left a telephone message for Union International Representative Robert McHugh, the Union's chief spokesperson in negotiations, advising him that the Company had acquired a trailer manufacturing facility in Georgia and would move the Northumberland production there in 4 to 6 weeks, and was open to bargaining with the Union on the fate of the Northumberland plant. (A 1673; Tr 203-204.) Sawyer confirmed this message in a letter. (A 1673; 722.)

Upon receiving the telephone message, McHugh phoned Sawyer and asked what the Union could do to reverse the decision to move the production work to Cartersville. Sawyer said that the decision was irreversible, but the Company was willing to

discuss its effect on the Northumberland plant. (A 1673-1674; Tr 202-203.) On October 11, in a letter to Plant Manager Gordy, McHugh reiterated the Union's request for bargaining over the decision to relocate the work as well as the effects of that decision. (A 1674; 897.) On the same day, the Company issued a press release announcing its acquisition of the Cartersville plant and its intention to begin production there in December. (A 1674; 919.)

The parties met on October 13, with the Company represented by Attorney Michael Mitchell and Vice President of Administration Paul Morrow. Mitchell said that the Company would shift production of both flatbed and dump trailers to Cartersville; that work at Northumberland would cease by late October or early November; that the Company did not need two facilities, but would bargain "over the effect and the reasons and . . . answer any questions;" that negotiations for the purchase of the Cartersville plant had begun "about 3½ [weeks] ago;" that the Company's previous contract proposal was withdrawn because changed circumstances rendered it inappropriate; that the decision to move production to Cartersville was separate from the decision whether to keep the Northumberland facility open; that the latter decision had not been made; and that if the Union could give the Company reason

to keep the facility open, it would be considered. (A 1674; 1215-1223, 1413-1417.)

On October 16, the Union made an unconditional offer to return to work on behalf of the striking employees. (A 1674; 895.) At the next negotiating session, on October 19, Mitchell said that the Company would begin discharging temporary employees and reinstating strikers. He added that not all strikers would be recalled, because the cancellation of orders had reduced the amount of work available; strikers not recalled would be deemed laid off. The Union protested the delay in reinstating the strikers. (A 1674; 1227-1232, 1417-1418.)

Mitchell also gave the Union a 60-day notice of plant closure, saying that it was conditional, because the Company had not yet decided what to do with the Northumberland facility. (A 1674; 915-916, 1227.) The Company had given its nonunit employees a 60-day notice in mid-September. (A 1674-1675 n.21; Tr 424-425, 437.)

McHugh said that the Union had no proposals to offer, because it had received information, which it had requested on October 13, only two hours before the October 19 meeting. Mitchell said that the closing of the Northumberland plant was being considered only because of the purchase of the Cartersville plant; that in view of the tax breaks the Company was receiving from the State of Georgia, the lower cost of

living in Georgia, which would enable the Company to pay lower wages there, and the lower freight costs, any agreement concerning Northumberland would have to be as economically attractive as the Cartersville deal; and that the Union would have to propose a package with serious concessions in the near future, or the Company would be unable to operate in Northumberland. McHugh asked what kinds of concessions the Company expected. Mitchell said he had no proposals, but the Company was looking for reductions in wages and benefits, mandatory overtime, and a free hand in running the business. (A 1674-1675; 1231-1232, 1419.) He suggested that the parties begin bargaining over effects. (A 1675; Tr 668.)

Mitchell told McHugh after the meeting that he had a proposal, but he did not present it to the Union until the next meeting. This proposal contained 31 concessions, called "bullet points," which the Company asserted were necessary for it to remain in Northumberland. These included a 5-year contract, a 20 percent across-the-board wage cut followed by a wage freeze for the duration of the contract, reductions in the number of paid holidays and the amount of vacation time employees could accrue, and changes in the group medical insurance plan, including an increase in employee contributions. (A 1675 & n.22; Tr 307, A 917-918.)

The "bullet points" proposal was presented to the Union at the beginning of the next negotiating session, on October 26. (A 1675; Tr 213, A 917.) McHugh said that, since he had just received the proposal, he was not prepared to present any counterproposals. He did offer to allow the Company to require employees to work four 10-hour days per week. Mitchell summarily rejected this proposal as "water under the bridge" and expressed regret that it had not been offered sooner. He agreed to give the Union a "reasonably short" time to respond to the "bullet points" proposal, but warned that the clock was ticking on the 60-day plant closing notice; that the Company had good economic reasons to close the Northumberland facility; and that the Union had to come up with a proposal that would convince the Company to stay in Northumberland. McHugh said that the Union would hold a membership meeting on October 30 to draft counterproposals. (A 1675-1676; 1233-1234, 1420-1421.)

The parties met again on November 6. Mitchell said that the Company intended to close the Northumberland plant and move to Cartersville and that unless the Union was ready to offer counterproposals, the parties should move on to "effects" bargaining. McHugh discussed each of the "bullet points," offering to accept some without, and some with, modifications, but rejecting others. He expressed a willingness to agree to the requested wage reduction and other economic concessions if

the Company opened its books to justify them. Mitchell declined to open the Company's books, saying the Company was not pleading poverty. He complained that the Union had not made any concrete proposals, but acknowledged that the Union had "given us a lot to think about" and promised to study the Union's counterproposals and respond later. (A 1676-1677; Tr 658, 674, A 1237-1239.)

At Mitchell's request, the remainder of the session was devoted to "effects" bargaining. Neither side offered a specific proposal, but the Union listed items it wanted included in a severance package. The parties agreed to contact each other to set a date for their next meeting. (A 1677; Tr 658, A 1239-1240.)

By letter dated November 9, Mitchell notified the Union that some of its counterproposals were acceptable, but others were not. He said that the Company had no more time to spend in negotiations, and that the decision to close the Northumberland plant was now final. (A 1677; Tr 218.) The plant was closed, and all unit employees terminated, on or about December 29. (A 1677; 1478.) During 1996, the Cartersville plant lost money every month, and its total net loss was $1,500,000. (A 1366.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Fox, Liebman, and Hurtgen) found, in agreement with the administrative law

judge, that the strike which began on June 26, 1995, was motivated at least in part by the Company's prior unfair labor practices, including its unilateral changes in its attendance policy, refusal to furnish information relating to employee attendance, and threats to close the plant in the event of a strike. Accordingly, the Board found that the strike was an unfair labor practice strike and that the Company therefore violated Section 8(a)(3) and (1) of the Act by failing promptly to reinstate the strikers after their unconditional offer to return to work. (A 1683-1685.)

The Board further found that the decision to relocate all bargaining unit work to Cartersville and close the Northumberland plant was a mandatory subject of bargaining. (A 1685-1686.) The Board further found that the Company had not bargained in good faith concerning the relocation decision and that, in any event, no impasse existed when the Company implemented that decision. Accordingly, the Board found, the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the relocation decision. (A 1687-1691.) In addition, the Board found, the relocation decision was motivated by a desire to retaliate against the employees for

going on strike and therefore violated Section 8(a)(3) and (1) of the Act. (A 1690-1692.)[3]

The Board ordered the Company to cease and desist from the conduct found unlawful and from in any other manner interfering with, restraining, or coercing employees in the exercise of their statutory rights; to reopen its Northumberland plant and reestablish its trailer manufacturing operations there; to bargain, upon request, with the Union over the decision to transfer such operations to Cartersville and to close the Northumberland plant and embody any understanding reached in a signed agreement; to offer all employees terminated as a result of the unlawful closure of the Northumberland plant reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions; to make all unit employees whole for any loss of earnings or other benefits suffered as a result of the Company's unlawful conduct; and to post copies of an appropriate notice or, if the plant is not

[3] Member Hurtgen concurred in the finding that the relocation of bargaining unit work was unlawful solely on the ground that the Company had not bargained to impasse before implementing the decision. (A 1664-1665.)

reopened, mail copies of the notice to all employees employed since June 30, 1995. (A 1692-1694.)[4]

SUMMARY OF ARGUMENT

1. Substantial evidence on the record as a whole supports the Board's finding that the strike beginning on June 26, 1995, was an unfair labor practice strike. The minutes of union meetings and the credited, uncontradicted testimony of a union agent and four striking employees show that the employees voted to strike on grounds including the Company's unilateral changes in attendance policy, refusal to furnish information about employee attendance, threats of plant closure in the event of a strike, and other conduct which the Board specifically found unlawful. It is immaterial that other conduct may have played a part in the decision to strike, for a strike is an unfair labor practice strike if caused even in part by the employer's unfair labor practices.

2. Substantial evidence on the record as a whole supports the Board's finding that the relocation of bargaining unit work from Northumberland to Cartersville was in retaliation for the employees' protected strike activity and therefore violated Section 8(a)(3) of the Act. The Board properly viewed the

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[4] The Board noted that the Company could introduce, at the compliance stage, any evidence which became available only after the instant hearing and which might show that compliance with the order to reopen the Northumberland plant would be unduly burdensome. (A 1663 n.2.)

relocation as a fulfillment of repeated threats that a strike would result in the closing of the Northumberland plant. A memo by a company vice president and statements by the Company's president to a magazine reporter cited the strike as a reason for closing the plant. Before the strike, the plant was highly profitable and had achieved record levels of productivity and efficiency; the Company had made substantial investments in it, and planned more, to bring about further improvements. The Company did not show that the losses resulting from the strike would have continued after its end, which preceded the transfer of work and equipment to Cartersville.

The Company failed to show that the asserted superiority of the Cartersville plant would have led it to transfer all unit work there even in the absence of union animus. It did not produce dump trailers at Cartersville, but acquired another plant to produce them, although Northumberland was closer to many of its customers, for whom the move to Cartersville increased the Company's shipping costs. In addition, the relocation foreseeably caused a disruption in production, which contributed to a decline in the Company's market share. As a result, production was significantly less at Cartersville than it had been at Northumberland before the strike, and the Cartersville plant suffered operating losses in every month up to the time of the hearing in this case.

3. The Board was warranted in finding that the relocation decision was a mandatory subject of bargaining and that the Company therefore violated Section 8(a)(5) of the Act by implementing the decision without bargaining to impasse. The finding that the relocation decision was discriminatorily motivated is a sufficient basis for the finding of a Section 8(a)(5) violation, for it demonstrates that the relocation was not a legitimate entrepreneurial decision.

Even assuming that the relocation decision was economically motivated, the Board was justified in finding it to be a mandatory subject of bargaining under Dubuque Packing Co., 303 NLRB 386 (1991). The relocation changed neither the scope nor the direction of the Company's business; it continued to produce the same products for the same customers. The Company failed to show that labor costs were not a factor in the relocation decision or that labor cost concessions could not have changed that decision. It repeatedly advised the Union that acceptance of the wage, benefit, and other concessions set forth in the "bullet points" proposal would save the Northumberland plant.

The Company did not contend before the Board, and therefore cannot contend in this Court, that the Dubuque standard is legally incorrect. In any event, Dubuque is not inconsistent with this Court's prior decision in Arrow Automotive Industries, Inc. v. NLRB, 853 F.2d 223 (4th Cir. 1988). Arrow interpreted

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), as establishing a per se rule that an employer need not bargain over a decision to close part of its business. However, First National Maintenance expressly stated that cases involving relocations are to be decided on their particular facts. Under Dubuque, a relocation that changes the scope or nature of the employer's operations, because the work at the new plant differs from the work at the old plant or some of the latter is discontinued, is not a mandatory subject of bargaining. The relocation here was not equivalent to a partial closing; no work previously done at Northumberland was discontinued, and the Cartersville plant essentially replaced the closed Northumberland plant.

4. The Board acted within its discretion in ordering the Company to reopen and reestablish its operations in Northumberland. Such an order is the presumptively appropriate remedy for an unlawful relocation of operations, unless the employer shows that such restoration would be unduly burdensome. The Board reasonably concluded, on the record before it, that the Company had not made such a showing. The Company did not show that restoration of the Northumberland plant would require expenditures on new equipment, that a reopened Northumberland plant would suffer greater losses than the Cartersville plant,

or that it would suffer a competitive disadvantage if it returned to Northumberland.

The Board's decision expressly permits the Company, at the compliance stage of this proceeding, to introduce evidence not available at the hearing that would show that a restoration remedy is no longer appropriate. The Company, which asserts that it sold the Northumberland plant after the Board issued its decision, may present evidence of the sale to the Board in the compliance proceeding. This Court should review the propriety of the Board's order as of the time it was issued, rather than overturn the order on the basis of evidence never presented to the Board.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER BASED ON UNCONTESTED FINDINGS OF VIOLATIONS

The Company does not contest the findings of the Board that it independently violated Section 8(a)(1) of the Act by directing employees to bring grievances to supervisors before going to the Union; telling them not to talk to the Union during working hours without a supervisor's prior approval; telling them it would close the plant because it had no time to waste on contract negotiations; and threatening them with plant closure and job loss if they went on strike. (A 1677-1680.) Nor does it contest the findings that it violated Section 8(a)(5) and (1) of

the Act by unilaterally changing its attendance policy and refusing to furnish the Union with information relating to employee attendance. (A 1681-1683.) The Company has thereby waived any objections to these findings. Corson and Gruman Co. v. NLRB, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990). Accordingly, the portions of the Board's order--paragraphs 1(b), (c), (e), 2(b), 2(d) insofar as it is based on the changes in attendance policy, 2(e), and the corresponding paragraphs of the required notice--based on the uncontested findings are entitled to summary enforcement. NLRB v. Frigid Storage, Inc., 934 F.2d 506, 509 (4th Cir. 1991).

However, the uncontested violations "do not disappear by not being mentioned in a brief. They remain, lending their aroma to the context in which the [contested] issues are considered." NLRB v. Clark Manor Nursing Home Corp., 671 F.2d 657, 660 (1st Cir. 1982).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE STRIKE BEGINNING ON JUNE 26, 1995, WAS AN UNFAIR LABOR PRACTICE STRIKE AND THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY FAILING TO REINSTATE THE STRIKERS AFTER THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

Unfair labor practice strikers are entitled to immediate reinstatement upon their unconditional offer to return to work, and any replacements hired during the strike must be dismissed if necessary to effect such reinstatement. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956). Accord NLRB v. Pepsi

Cola Co. of Lumberton, 496 F.2d 226, 229 n.3 (4th Cir. 1974). "A strike that is caused in whole or in part by an employer's unfair labor practices is an unfair labor practice strike." Northern Wire Corp. v. NLRB, 887 F.2d 1313, 1319 (7th Cir. 1989). Accord Northern Virginia Steel Corp. v. NLRB, 300 F.2d 168, 174 (4th Cir. 1962). It is immaterial that other reasons for the strike may have been more important, for "'if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike.'" NLRB v. Cast Optics Corp., 458 F.2d 398, 407 (3d Cir. 1972) (citation omitted). Accord Domsey Trading Corp., 310 NLRB 777, 791 (1993), enforced, 16 F.3d 517 (2d Cir. 1994).

Because the question of causation is essentially factual, the Board's findings are conclusive if supported by substantial evidence on the record as a whole. A reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Accord NLRB v. Grand Canyon Mining Co., 116 F.3d 1039, 1044 (4th Cir. 1997); Columbia Portland Cement Co. v. NLRB, 915 F.2d 253, 259 (6th Cir. 1990).

The Company does not challenge the Board's findings, (A 1684-1685), that it waited 7 to 10 days after the strikers'

unconditional offer to return to work to dismiss the temporary workers hired to replace them and waited 7 to 14 days to recall strikers, nor does it deny that such delay would be unlawful if the strike was an unfair labor practice strike. The Board found, (A 1683-1684), that the strike was an unfair labor practice strike from its inception. As shown below, the record amply supports this finding.

The Board's finding was based on the minutes of union meetings and the testimony of Union International Representative McHugh and four striking employees concerning the reasons for the strike. The minutes of the June 24 union meeting, at which the employees voted to strike on June 26, (A 1282-1283), show that the employees voted to base the strike on the grounds previously discussed in a February 25 meeting, as well as additional grounds, including a supervisor's telling two employees to bring their grievances to him and not to the Union--conduct which the Board found unlawful. (A 1678.)

The minutes of the February 25 meeting show that the employees rejected an immediate strike after being told that they could not receive unemployment benefits unless the strike was an unfair labor practice strike. Several possible grounds for asserting that it was an unfair labor practice strike were mentioned, including the unilateral change in the attendance policy, refusal to furnish information, and threats that the

plant would shut down (A 1257-1258, 1261-1262), all of which the Board found unlawful. (A 1678-1683.) The employees voted to rely on this conduct in calling a strike. (A 1261-1262.)

McHugh testified that at the February meeting, he discussed several unfair labor practices, including the change in attendance policy, with the employees as grounds for a strike. The employees voted to allow a committee to determine the timing of, and the reasons for, any strike. (A 1261-1262.) McHugh further testified that at the June 24 meeting, the employees voted to strike for the reasons set forth by the committee, including the matters discussed in February and additional actions by the Company thereafter, such as the threats to close the plant in the event of a strike. (Tr 195.) All four employees who testified concerning their reasons for striking recalled the change in attendance policy as a reason discussed at the meetings. (Tr 323, 404, 445, 469.)

The foregoing evidence clearly establishes that unfair labor practices, especially the change in attendance policy and the threats of plant closure, played a part in the employees' decision to strike. The fact that the decision may have also been based in part on other conduct does not preclude a finding that the strike was an unfair labor practice strike.

The Company attacks the testimony of McHugh and the employees as "self-serving" (Br 15, 19). However, that

testimony was both credited (A 1684) and uncontradicted. It is settled that credibility determinations "should be accepted by the reviewing court absent 'exceptional circumstances.'" Fieldcrest Cannon, Inc. v. NLRB, 97 F.3d 65, 69 (4th Cir. 1996) (citation omitted). The fact that the credited testimony was "self-serving" is not such an "exceptional circumstance," especially where, as here, the issue involved--the employees' reasons for striking--is one on which any available witness' testimony would likely be self-serving.

No employee testified that he or she went on strike because of the threats of plant closure. However, contrary to the Company's suggestion, (Br 16 n.4), this does not preclude a finding that the threats were a factor in the decision to strike. McHugh's testimony (Tr 195) and the minutes of the June 24 meeting (A 1283) establish that the employees voted to strike for the reasons stated by a committee, and McHugh's testimony establishes that the unlawful threats were one of those reasons. Where employees rely on the views of union leaders in deciding to strike, the leaders' reasons for urging a strike are sufficient evidence of causation. See Teamsters Local 515 v. NLRB, 906 F.2d 719, 724-726 (D.C. Cir. 1990); Brooks, Inc., 228 NLRB 1365, 1367 n.12 (1977), enforced in pertinent part, 593 F.2d 936, 940 (10th Cir. 1979).

The Company also contends, (Br 17-18), that the unilateral change in the attendance policy could not have been a factor in the strike because the parties were bargaining about the changes when the strike began. However, the belated bargaining did not remedy the Company's unlawful actions. The changes made unilaterally remained in effect, and the employees who had lost money as a result of those changes had not been compensated. Thus, the unlawful changes remained a live issue.

Moreover, the fact that the Union did not call a strike immediately after the unilateral change in attendance policy, but waited until other unfair labor practices had occurred, does not, as the Company contends, (Br 18), prove that the attendance policy change played no part in the decision to strike. Where an unfair labor practice remains unremedied, the passage of time between its commission and the beginning of a strike does not eliminate it as a cause of the strike. See R & H Coal Co., 309 NLRB 28, 28 (1992) (strike postponed for strategic reasons until 13 months after unfair labor practices held unfair labor practice strike where unfair labor practices were still unremedied at time of strike and telegram authorizing strike, as well as picket signs during strike, referred to unfair labor practices), enforced mem., 16 F.3d 410 (4th Cir. 1994).

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) (3), AND (5) OF THE ACT BY TRANSFERRING ALL BARGAINING UNIT WORK FROM ITS NORTHUMBERLAND FACILITY TO ITS CARTERSVILLE FACILITY IN RETALIATION FOR THE EMPLOYEES' PROTECTED STRIKE ACTIVITY AND WITHOUT BARGAINING TO IMPASSE WITH THE UNION

The Board found that the relocation of work from Northumberland to Cartersville violated both Section 8(a)(3) and Section 8(a)(5). Because the findings of violations of the two sections present different issues, they are discussed separately below.

A. The Relocation Violated Section 8(a)(3)

The Board found, (A 1685 n.29), and the Company does not deny, that the transfer of all bargaining unit work to Cartersville led inexorably to the closing of the Northumberland plant and the discharge of all unit employees. Such a discharge, if motivated by the employees' protected strike activity, violates Section 8(a)(3) and (1) of the Act, whether the strike was an economic strike or an unfair labor practice strike. NLRB v. International Van Lines, 409 U.S. 48, 52-53 (1972). In particular, transfer of the situs of a business, or a portion thereof, for the purpose of depriving employees of their statutory rights is unlawful. Garment Workers Local 57 v. NLRB, 374 F.2d 295, 298 (D.C. Cir. 1967).[5]

[5] The holding in Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 275-276 (1965), that the permanent closing of a portion of a

The governing principles were set forth in Wright Line, 251 NLRB 1083, 1089 ((1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), and approved in NLRB v. Transportation Management Corp., 462 U.S. 393, 402-403 (1983). The burden is initially on the Board's General Counsel to show that employees' union activities or sympathies were a motivating factor in the adverse action taken against them. Once that showing has been made, the employer's action will be found unlawful unless the employer demonstrates that the adverse action would have been taken even in the absence of protected activity. Wright Line, 251 NLRB at 1089. Accord NLRB v. Nueva Engineering, Inc., 761 F.2d 961, 967 (4th Cir. 1985). The Board may infer discriminatory motivation from either direct or circumstantial evidence, and its finding as to motive must be accepted if supported by substantial evidence on the record as a whole. NLRB v. Nueva Engineering, Inc., 761 F.2d at 967.

In finding unlawful motivation, the Board relied, (A 1690), on the findings, uncontested here, of repeated threats that the

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business violates Section 8(a)(3) only if the employer intends and can reasonably foresee that the closing will discourage union activity in the remaining portions of the business, does not apply here. Darlington expressly distinguished "the case of a 'runaway' shop, whereby [the employer] would transfer its work to another plant or open a new plant in another locality to replace its closed plant." 380 U.S. at 272-273. The Board has consistently declined to apply Darlington in such cases. See, e.g., Direct Transit, Inc., 309 NLRB 629 n.1 (1992); Lear Siegler, Inc., 295 NLRB 857, 859-860 & nn. 17, 18 (1989).

consequence of a strike would be the closing of the Northumberland plant, as well as other findings of unfair labor practices, some of which are also uncontested here, and which show the Company's union animus. Such animus is highly probative evidence of unlawful motivation. See Alpo Petfoods, Inc. v. NLRB, 126 F.3d 246, 253 (4th Cir. 1997); NLRB v. Daniel Construction Co., 731 F.2d 191, 197 (4th Cir. 1984). In particular, the shutdown of the plant is properly regarded as a fulfillment of the prior threats. See Darlington Mfg. Co. v. NLRB, 397 F.2d 760, 766 (4th Cir. 1968) (en banc); NLRB v. Hale Container Line, Inc., 943 F.2d 394, 398-399 & n.29 (4th Cir. 1991).

In addition, a memo from Charles Chitwood, the Company's Vice President of Finance, to Company President Marks and other top officials, cited "the bitterness of many striking employees and their intransigent position on mandatory overtime" as reasons for closing the Northumberland plant (A 1296), and Marks herself admitted telling a magazine reporter that "[s]ometimes it takes a real kick in the skirts for us to focus on what we should be doing" and did not deny telling the reporter, in substance, that the plant closure was in response to "an ugly strike," although she denied using the latter words. (Tr 713-714.) The Board reasonably interpreted these remarks as virtual admissions that the plant was closed in retaliation for the

strike. NLRB v. Hale Container Line, Inc., 943 F.2d 394, 401 (4th Cir. 1991).

The Board also properly relied, (A 1691), on the prestrike financial success of the Northumberland plant and the quality of the facility as evidence of antiunion motivation for the closure.[6] The plant was highly profitable during 1994 (approximately $1,400,000 (Tr 559)) and the first six months of 1995 (more than $1,500,000, with profits exceeding $200,000 in each of the first five months (A 1365)). Its productivity and efficiency exceeded all expectations and were at the highest levels in its history. (Tr 528.) The Company had invested more than $100,000 in the plant in the second half of 1994, and planned to invest another $160,000 in 1995 for further

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[6] Contrary to the Company's contention, (Br 29-30), the administrative law judge, whose findings the Board adopted, clearly considered the asserted economic justification for the transfer of production to Cartersville in determining whether the General Counsel had proven the transfer was unlawfully motivated, and not merely in determining whether the Company had established its Wright Line defense.

Thus, after noting that "[s]everal factors convince me that [the Company's] decision to relocate to Cartersville and close the Northumberland facility was motivated more by a desire to retaliate against employees for going on strike than by [economic factors]," Judge Aleman proceeded to discuss the asserted economic justification for the transfer and find it insufficient. (A 1691.) Accordingly, the Company's contention that he applied the wrong legal standard is without merit. However, if the Court concludes otherwise, its proper procedure is not, as the Company suggests, (Br 30), to review the evidence de novo and make its own findings, but to remand to the Board to make findings under the correct legal standard. See South Prairie Construction Co. v. Operating Engineers Local 627, 425 U.S. 800, 805-806 (1976).

improvements. (Tr 527.) Plant Manager Gordy testified that no one in the Company wanted to see all these accomplishments and investments lost. (Tr 528.) Yet they were lost when the Company transferred all the work to Cartersville and closed the plant. The Board reasonably inferred, (A 1691), that hostility toward the striking employees accounted for the Company's willingness to accept such losses. Cf. Carter & Sons Freightways, Inc., 325 NLRB 433, 439 (1998) (closing of terminal found discriminatory where terminal showed net profit in each of last five months prior to closing and nine other facilities which were losing money remained open); Mid-South Bottling Co., 287 NLRB 1333, 1344-1348 (1988) (closing of plant found discriminatory where its production and operating profit increased significantly in months immediately before closing, employer had told employees prior to Board election that plant was the most profitable in the organization, and owner had recently ordered that plant be made sufficiently profitable to justify anticipated expenditure of $400,000 for a new building), enforced, 876 F.2d 458 (5th Cir. 1989).

The Board acknowledged, (A 1691), that the strike adversely affected the Northumberland plant; it led to cancellation of orders, loss of production, and operating losses which essentially wiped out the profits from the first half of 1995. However, as the Board pointed out, (A 1691), the strike ended on

October 16, before any work or equipment was transferred to Cartersville (Tr 554, 667, A 1298-1300), and three weeks before the Company last told the Union that any such transfer was still reversible. (Tr 669.) The Board further found, (A 1691), that once the strike was over, the Company could have resumed normal production at Northumberland in a relatively short time, and that the Company had shown no basis for believing that the losses resulting from the strike would continue once production resumed. In contrast, the Company knew that moving production to Cartersville would cause the "bleeding" from the strike to continue for at least six months, because of the difficulties and expenses associated with starting production at a new location. (Tr 621-622, 624.)

The Company, however, contends, (Br 31-33), that, while it initially sought to acquire the Cartersville plant simply to continue production during the strike, it ultimately decided to transfer all production from Northumberland to Cartersville because of the superiority of the Cartersville plant. As shown below, the record does not support this contention.

Several of the asserted advantages of the Cartersville plant do not withstand scrutiny. Thus, the Company contends, (Br 32), that the move to Cartersville substantially increased its production capacity and gave it "the opportunity to build types of trailers not possible in Northumberland." (Tr 551.)

However, at the time of the hearing (November 1996), the Cartersville plant was operating at only 60 percent of capacity and was actually producing fewer trailers than the Northumberland plant had before the strike. (Tr 495.) Indeed, in only 2 of the first 10 months of 1996 were the monthly sales of trailers from Cartersville as much as half the sales from Northumberland in each of the first 5 months of 1995. The average monthly sales at Cartersville during the first 10 months of 1996 were $1,273,000, a number barely exceeding the sales from Northumberland in September 1995, during the strike, and far short of the average of $3,110,000 per month at Northumberland during the six months before the strike. (A 1365-1366.)

Although Company President Marks testified that the purpose of acquiring the Cartersville plant was to manufacture only dump trailers and not flatbed trailers (Tr 702), the Company did just the opposite: it moved the production of flatbeds from Northumberland to Cartersville, but manufactured no dump trailers at Cartersville, because it quickly concluded that producing only one kind of trailer there would be far more efficient and less costly. (Tr 555, 623, 702.) It did not, however, use the Northumberland plant to produce dump trailers, although the reasons for not doing so earlier--the same considerations of efficiency and cost, and the lack of space to

produce both flatbeds and dump trailers (Tr 551)--had vanished with the move of flatbed production to Cartersville. Instead, it purchased a third plant, in South Carolina, and began producing dump trailers there. (Tr 623, 702.) The Board reasonably inferred, (A 1692 n.40), that it did so to avoid having to deal with the Union at Northumberland.

The record does not support the Company's assertion, (Br 32), of major reductions in freight and shipping costs as a result of the move to Cartersville. In particular, although the Company asserts, (Br 32), that "more than 80% of [its] customers were located in the southeast," a listing of 36 major customers shows that only 12 were located in the South; these 12 accounted for slightly over half its sales of flatbed trailers in 1995 (1001 of 1895), but less than 40 percent (127 of 345) of its sales of dump trailers. Another 14 customers, accounting for sales of 558 flatbed trailers (almost 30 percent of the total) and 163 dump trailers (nearly half the total) were in the Northeast or Ohio or Michigan; shipping costs for these customers were significantly higher from Cartersville than from Northumberland. Six other customers, who ordered 83 flatbeds and 47 dump trailers, were in Illinois and Wisconsin; shipping

costs for them were virtually identical from the two locations. (A 1354.)[7]

Any savings in shipping costs were confined to flatbed trailers; the production of dump trailers in Cartersville would have actually increased the total cost of shipping them to customers (A 1354), and their actual production in South Carolina, rather than at Northumberland, presumably had the same effect. Plant Manager Gordy testified that the Company produced dump trailers primarily for sale in the Northeast and that Northumberland was the best place to produce for that market (Tr 551-552.) However, as noted above, p. 36, the Company elected instead to buy a third plant in South Carolina to produce dump trailers, thus indicating its unwillingness to maintain any production in Northumberland, even when it would have been economically advantageous to do so.

In addition, a United States District Court has found that "[t]he relocation had a negative effect on [the Company's] financial stability" and that the Company "experienced a decline in market share at or about the time of relocation," which was due, in part, "to the disruption in manufacturing caused by the

[7] The Company cites the proximity of Cartersville to Interstate 75 as a major factor in reducing shipping costs (Br 32). However, Northumberland is close to Interstate 80, a major route to both New York City and the Midwest.

relocation." (A 1479.)[8] This adverse impact is reflected in evidence showing that the Cartersville plant suffered operating losses in every one of the first ten months of 1996, with a total net operating loss of over $1,350,000 for the ten months. (A 1366.) The district court's findings suggest that the negative impact continued at least up to the time of the court's decision in August 1997. (A 1468.) This impact, foreseeable at the time of the relocation decision, must be weighed against the alleged advantages of the Cartersville plant. The Board cannot be faulted for concluding, (A 1691-1692), that the Company had not shown that it would have accepted this disadvantage even in the absence of union animus.

B. The Relocation Violated Section 8(a)(5)

The Company does not contest the Board's finding that it did not bargain to impasse over the decision to relocate the bargaining unit work. (A 1686-1690.) It argues only that the decision was not a mandatory subject of bargaining. (Br 20-28.) Accordingly, if the Board reasonably found the decision to be a

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[8] These findings were made in a decision denying the Board's request for injunctive relief under Section 10(j) of the Act (29 U.S.C. § 160(j)). While the Third Circuit reversed this decision and ordered injunctive relief, it did not overturn the findings set forth in the text. To the contrary, it noted that the Company estimated the total cost of the relocation (including the purchase of the South Carolina plant) at more than $900,000. Hirsch v. Dorsey Trailers, Inc., 147 F.3d 243, 246 (3d Cir. 1998). It also observed that "the negative impact caused by the relocation . . . was of [the Company's] making." Id. at 248.

mandatory subject of bargaining, its finding of a violation of Section 8(a)(5) of the Act is entitled to affirmance, for it is settled that, absent impasse, a unilateral change in any term or condition of employment over which bargaining is required violates Section 8(a)(5). NLRB v. Katz, 369 U.S. 736, 743, 747 (1962); Universal Security Instruments, Inc. v. NLRB, 649 F.2d 247, 258-259 (4th Cir. 1981).

We have shown above, pp. 30-38, that the relocation decision was motivated by union animus. The Board and courts have often held that such motivation justifies a finding of a violation of Section 8(a)(5), even where the decision would not require bargaining if economically motivated. See, e.g., NLRB v. Joy Recovery Technology Corp., 134 F.3d 1307, 1315-1316 (7th Cir. 1998); Mid-South Bottling Co., 287 NLRB 1333, 1333 (1988), enforced, 876 F.2d 458, 460 (5th Cir. 1989); Equitable Resources Energy Co., 307 NLRB 730, 732-733 n.11 (1992), enforced mem., 989 F.2d 492 (4th Cir. 1993). The rationale for these holdings is that a decision made for the purpose of retaliating against employees for protected activity "[can]not constitute a legitimate entrepreneurial decision.". Parma Industries, Inc., 292 NLRB 90, 90 (1988). This rationale provides a sufficient basis for upholding the Board's finding of a violation of Section 8(a)(5). However, the Board also found that the relocation decision, even if economically motivated, was a

mandatory subject of bargaining. (A 1685-1686.) As shown below, that finding provides an independent basis for upholding the Board's finding of a Section 8(a)(5) violation.

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), as amplified by Section 8(d) (29 U.S.C. § 158(d)), requires bargaining about "wages, hours, and other terms and conditions of employment." The Board's construction of this statutory term should be upheld if it is "reasonably defensible." Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979). "[B]ecause the 'classification of bargaining subjects as "terms or conditions of employment" is a matter concerning which the Board has special expertise, . . . its judgment as to what is a mandatory bargaining subject is entitled to considerable deference." Id. at 495 (citation omitted).

In construing Section 8(d) in First National Maintenance Corp. v. NLRB, 452 U.S. 666, 676-677 (1981) ("First National Maintenance"), the Supreme Court described three types of management decisions. First, decisions which "have only an indirect and attenuated impact on the employment relationship" are not mandatory subjects of bargaining. Second, decisions which are "almost exclusively 'an aspect of the relationship' between employer and employee" are mandatory subjects of bargaining. Finally, bargaining over a decision which has a direct impact on employment, but is focused on concerns apart

from the employment relationship, is "required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 679.

In First National Maintenance, the Supreme Court held that an employer was not required to bargain over "an economically motivated decision to shut down part of a business." 452 U.S. at 680. There the employer "had no intention to replace the discharged employees or to move [the] operation elsewhere." Id. at 687. The Supreme Court viewed the case as involving "a significant change in [the employer's] operations, . . . not unlike opening a new line of business or going out of business entirely." Id. at 688. However, the Court emphasized, "we . . . intimate no view as to other types of management decisions, such as plant relocations, . . . which are to be considered on their particular facts." Id. at 686 n.22. The Court cited two cases in which relocations motivated primarily by labor costs were found to be mandatory subjects of bargaining: Garment Workers v. NLRB, 463 F.2d 907 (D.C. Cir. 1972), and Weltronic Co. v. NLRB, 419 F.2d 1120 (6th Cir. 1969).

In Dubuque Packing Co., 303 NLRB 386, 391 (1991), enforced in pertinent part sub nom. Food and Commercial Workers Local 150-A v. NLRB, 1 F.3d 24, 30-33 (D.C. Cir. 1993) ("Dubuque"), the Board adopted the following standard for determining when a

relocation of operations is a mandatory subject of bargaining: The General Counsel has the burden of establishing that the relocation of unit work was unaccompanied by a basic change in the employer's operations. The employer may prevail by showing either that work previously done at the old plant is to be discontinued, rather than moved to the new location, or that the relocation involves a change in the scope and direction of the enterprise. Alternatively, the employer may prove that labor costs were not a factor in the decision to relocate or that labor cost concessions by the union could not have changed that decision.

Although the relocation in Dubuque involved only a portion of the plant's operations, the Board has applied Dubuque where all of the plant's operations were transferred to other plants, and the plant was closed. The Board has held that where all of the work formerly done at the closed plant is still being done, the kind of partial closing addressed in First National Maintenance has not occurred. See Owens-Brockway Plastic Products, 311 NLRB 519, 520-521 (1993); Nu-Skin International, Inc., 320 NLRB 385, 386 (1995).

In Dubuque itself, the District of Columbia Circuit upheld the Board's new standard. The court noted that the Dubuque standard "exempts from the duty to negotiate relocations that, viewed objectively, are entrepreneurial in nature [and]

decisions that, viewed subjectively, were motivated by something other than labor costs," and "excuses employers from attempting to negotiate when doing so would be futile or impossible." Food and Commercial Workers Local 150-A v. NLRB, 1 F.3d 24, 31 (D.C. Cir. 1993). Thus, bargaining is required only where a relocation "will not 'alter the [employer's] basic operation . . . in a way that implicates the employer's 'core of entrepreneurial control,'" where "'a desire to reduce labor costs' [lies] 'at the base of the employer's decision,'" and where "there will be some prospect of resolving the relocation dispute 'within the collective bargaining framework.'" Id. at 32 (citations omitted). All of the foregoing statements must be true before bargaining is required. Id. Further, the Board's standard "exempts from the duty to bargain relocations in which 'the work performed at the new location varies significantly from the work performed at the former plant.'" Id. (quoting Dubuque, 303 NLRB at 391). Further, the court noted that, although "relocations involve the expenditure of capital . . . First National Maintenance . . . did not . . . indicate that a line protecting all decisions to expend capital must be drawn" and that, accordingly, "the Board's test does not impermissibly fail to protect management's prerogatives over capital investment." Id.

The Third Circuit has also observed that Dubuque "contained a thoughtful discussion of the bargaining obligation imposed by the Act that accurately reflected the framework established by Fibreboard [Paper Products Corp. v. NLRB, 379 U.S. 203 (1964)] and First National [Maintenance] . . . ." Furniture Rentors of America, Inc. v. NLRB, 36 F.3d 1240, 1246 (3d Cir. 1994).

The Board was clearly warranted in finding, (A 1685-1686), that, under the Dubuque test, the relocation decision here was a mandatory subject of bargaining. The relocation changed neither the scope nor the direction of the Company's business. Before the relocation, the Northumberland plant manufactured primarily flatbed trailers. (Tr 536, 551, A 1646.) After the relocation, the Cartersville plant manufactured only flatbed trailers. (Tr 554-555, 623, 702.) However, the dump trailer production previously performed at Northumberland was not discontinued; the Company ultimately acquired another plant for that production. (Tr 623, 702.) Moreover, the relocation decision did not entail any change in the Company's customers. (Tr 550, A 1354.)

Thus, the Company continued to produce the same products for the same customers after the relocation as before. Nothing changed except the location of production. That change, without more, is not the sort of change described in First National Maintenance as "akin to the decision whether to be in business

at all" (452 U.S. at 677) or "not unlike opening a new line of business or going out of business entirely" (id. at 688).

The Board made it clear in Dubuque, 303 NLRB at 392 n.14, that the existence of an obligation to bargain depends on the actual motive for the relocation. We have shown above, pp. 34-38, that the asserted superiority of the Cartersville plant was not the actual motive for the relocation decision. However, even assuming that it played a part in that decision, the Board was warranted in finding that the Company had not met its burden under Dubuque of proving that labor costs were not a factor in the decision or that labor cost concessions could not have changed that decision.

For a full month after agreeing to buy the Cartersville plant, the Company assured the Union that the bargaining unit work was not irrevocably lost. (Tr 669.) To preserve the work for the Northumberland employees, the Company kept saying, the Union would have to make it economically attractive for the Company to remain in Northumberland, by making concessions in wages, benefits, holidays, and vacations. (A 1231-1232, 1234, 1237, 1419.) In particular, the Company submitted "bullet points" calling for concessions in all these areas. (Tr 211, 213-214, 307-308, A 917-918.) Thus, the Company implied that it was willing to forgo the asserted advantages of the Cartersville

plant, and keep the work in Northumberland, if it received sufficient concessions on labor costs.

The facts here are strikingly similar to those in Dubuque, where the Board, in finding a relocation to be a mandatory subject of bargaining despite assertions of the superiority of the newly acquired facility to which the work was moved, noted that the employer "repeatedly linked its future at [the old plant] to its ability to reduce wages and increase production" and "unequivocally and repeatedly told the press, the [u]nion, its employees, and the Chamber of Commerce that if the [u]nion would grant concessions, the [employer] would continue" operating at the old plant. 303 NLRB at 396. Cf. Owens-Brockway Plastic Products, Inc., 311 NLRB 519, 522 (1993) (employer's persistent stressing of need for wage concessions prior to relocation compels conclusion that labor costs were a factor in relocation decision).

In arguing that the relocation here was not a mandatory subject of bargaining, the Company relies, (Br 21-27), on this Court's decision in Arrow Automotive Industries, Inc. v. NLRB, 853 F.2d 223 (1988) ("Arrow"). However, before the Board, the Company argued only that the relocation was not a mandatory subject of bargaining under the Dubuque standard. (A 1605-1611.) It did not argue that the Dubuque standard was either inconsistent with Arrow or otherwise wrong as a matter of law.

Accordingly, Section 10(e) of the Act (29 U.S.C. § 160(e))[9] precludes the Company from raising either argument in this Court. Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-666 (1982).

In any event, the Company's contention is without merit. In Arrow, this Court held that an employer had no obligation to bargain over a decision to close one of its four plants and transfer the work done there to one of the remaining plants. The Court viewed First National Maintenance as establishing "a per se rule that an employer has no duty to bargain over a decision to close part of its business." 853 F.2d at 227. It found that the case before it involved a partial closing, rather than a relocation, because "the closing decreased the number of [the employer's] plants, and altered the geographic focus of [its] operations," whereas a relocation would occur if the employer "replaces an existing plant with a new plant that will perform the same work in a different place." Id. at 229.

Further, the Court found that, even if the decision were viewed as a relocation, it "was an exercise of entrepreneurial direction and control which was not subject to the duty of mandatory bargaining." 853 F.2d at 230. The decision turned on

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[9] Section 10(e) provides, in pertinent part, that "[n]o objection that has not been urged before the Board, . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

labor costs only in the sense that every economically based decision does, since "[l]abor costs are inescapably a part of the economic picture of the enterprise . . . ." Id. at 228. The primary economic factor was a decline in the market served by the closed plant. Id. at 230.

Arrow preceded the Board's decision in Dubuque, and thus did not consider the Board's reasoning in that decision. Previously, in Otis Elevator Co., 269 NLRB 891 (1984), the four participating Board members had written three separate opinions, each setting forth a different standard for determining when bargaining over a relocation decision is required. None of those standards ever won the support of a Board majority. Thus, when deciding Arrow, this Court had no Board interpretation of the Act to review. It assumed that the plurality opinion in Otis represented Board law. 853 F.2d at 227. As shown below, none of the Court's objections to that opinion constitutes a valid ground for rejecting the Dubuque standard.

The plurality in Otis stated that bargaining would not be required over "decisions which affect the scope, direction, or nature of the business," but would be required over "all decisions which turn upon a reduction of labor costs." 269 NLRB at 893. However, as this Court pointed out in Arrow, 853 F.2d at 227-228, these two categories are not mutually exclusive, and the plurality opinion thus left open the possibility that a

change in the scope or direction of the enterprise might require bargaining if motivated by labor costs. Dubuque forecloses this possibility; under its standard, unless the General Counsel can show that a relocation is "unaccompanied by a basic change in the nature of the employer's operation" (303 NLRB at 391), bargaining will not be required.

Dubuque also clearly recognizes, as this Court stressed in Arrow, that whether bargaining over a management decision is required depends not on the label attached to the decision, but on its substance. Thus, Dubuque states (303 NLRB at 391) that bargaining will not be required where "the work performed at the new location varies significantly from the work performed at the former plant" or "the work performed at the former plant is to be discontinued entirely and not moved to the new location." In either case, the employer's action, although in form a relocation of operations, is in substance a basic change in the scope or nature of operations, and therefore does not require bargaining.

The decision here was clearly a relocation, rather than a partial closing, as this Court defined the terms in Arrow, 853 F.2d at 229. In essence, the Cartersville plant replaced the Northumberland plant, performing the same work previously performed there. Neither the number of plants operated by the

Company nor the customers it served were changed.[10] Moreover, the manufacturing process was no different at Cartersville than at Northumberland, and no work previously done at Northumberland was discontinued. Accordingly, the substance of the Company's action was a change only in where its work was done, not in what work was done.

The Company contends, (Br 22, 27), that Arrow's interpretation of First National Maintenance--namely, as establishing a per se rule that bargaining over economically motivated partial closings is not required--is equally applicable to relocations, at least when they involve the closing of a plant. This contention ignores First National Maintenance's explicit statement that plant relocations "are to be considered on their particular facts" (452 U.S. at 686 n.22), followed by a citation to Garment Workers v. NLRB, 463 F.2d 907 (D.C. Cir. 1972), which held that the relocation of a plant from

[10] The subsequent acquisition of another plant which was used to manufacture dump trailers does not alter this analysis. The Board found, (A 1685 n.29), that the decisions to transfer the Northumberland work to Cartersville and to close the Northumberland plant were in reality one decision, which was a mandatory subject of bargaining. The acquisition of the second plant, which took place months later (Tr 623, 702), was a separate decision not found to be a mandatory subject of bargaining. Cf. BC Industries, Inc., 307 NLRB 1275, 1275 n.2, 1281-1282 (1992) (decisions to close two plants found not mandatory subjects of bargaining under First National Maintenance; decision to relocate one of the plants, which was mobile, more than a year after it closed found not mandatory subject of bargaining where General Counsel expressly disclaimed reliance on Dubuque).

Indiana to Alabama "did not alter the scope of the enterprise" and was therefore a mandatory subject of bargaining where, after the relocation, the employer "manufacture[d] the same products using the same machinery, its product [was] sold to the same customers, and the business [was] owned and managed by essentially the same persons as before." 463 F.2d at 916-917.

The foregoing facts are equally true here. In contrast, the "specific facts of this case" which the Court emphasized in First National Maintenance, 452 U.S. at 687-688--that the employer "had no intention to replace the discharged employees or to move [the discontinued] operation elsewhere;" that the employer's action was motivated by a third party's unwillingness to pay it an adequate fee, a matter not within the union's control; and that the case involved a newly certified union, not "an employer's abrogation of ongoing negotiations"--are not present here. Accordingly, First National Maintenance does not preclude a finding that bargaining was required over the relocation decision here.

In addition, the Supreme Court had previously held, in a case arising under Section 8(a)(3), that the permanent closing of a plant is distinguishable from a "runaway shop" whereby the employer opens a new plant in another locality to replace the closed one. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 272-273 (1965). The Board reasonably concluded in Dubuque,

303 NLRB at 391, that the two situations are likewise distinguishable for the purpose of applying Section 8(a)(5)--that, even where the employer's motivation is economic, the difference between discontinuing an identifiable part of his operations and continuing those operations at a different location is a difference of substance, not of labels.

In addition, in this case, unlike Arrow, the Board's finding that the relocation decision turned on labor costs was not based simply on evidence that the employer's overall economic situation underlay the decision. Rather, as noted above, pp. 45-46, the Board expressly relied, (A 1686 & n.30), on the Company's repeated assurances to the Union that it would reconsider the relocation decision if the Union offered sufficient concessions in wages and benefits. The Board cannot be faulted for taking the Company at its word.[11]

This Court, in Arrow, 853 F.2d at 232, also criticized the plurality opinion in Otis as "leav[ing] management at sea as to whether it had an obligation to bargain, as an employer could never be certain when a decision might ultimately be found by

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[11] If, as the Board suggested, (A 1686), the Company had irrevocably decided to move the Northumberland work to Cartersville, regardless of what concessions the Union might offer, its lack of candor would be the sort of bad faith which the Court, in First National Maintenance, 452 U.S. at 683-684, suggested would warrant a finding of a Section 8(a)(5) violation. "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956).

the Board to be too closely related to labor costs." This echoed the Supreme Court's statement in First National Maintenance, 452 U.S. at 679, that management "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice."

The Board, in Dubuque, expressly recognized the need to "develop a test that provides guidance and predictability to the parties." 303 NLRB at 390. It concluded that the test it adopted, by specifically defining the parties' respective burdens of proof, "clearly apprises the parties of their obligations at the bargaining table and in litigation" (303 NLRB at 392) and "encourage[s] and require[s] the employer to evaluate all the factors motivating its relocation decision when determining whether its course of action should include negotiations with the [u]nion." Id. at 392 n.16.

The District of Columbia Circuit, in upholding the Board's Dubuque test, found that it "establishes rules on which management may plan with a large degree of confidence" and that any remaining areas of uncertainty would ultimately be narrowed through adjudication. Further, the court pointed out, First National Maintenance "does not require that the Board establish standards devoid of ambiguity at the margins." Food &

Commercial Workers Local 150-A v. NLRB, 1 F.3d 24, 33 (D.C. Cir. 1993).

In summary, the Board's Dubuque standard represents a reasonable construction of a statutory term which, as the Supreme Court recognized in First National Maintenance, 452 U.S. at 675, 679, is far from clear. That construction is entitled to deference under Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 843-844 (1984), and Holly Farms Corp. v. NLRB, 517 U.S. 392, 398-399, 409 (1996). Accordingly, even if the Court concludes, contrary to the Board, that the relocation decision here was economically motivated, it should uphold the Board's findings that the Company was obligated to bargain about that decision and that it violated Section 8(a)(5) by failing to do so.[12]

IV. THE BOARD ACTED WITHIN ITS DISCRETION IN ORDERING THE COMPANY TO REOPEN AND REESTABLISH ITS OPERATIONS IN NORTHUMBERLAND

Section 10(c) of the Act (29 U.S.C. § 160(c)) empowers the Board to issue an order requiring a violator of the Act to cease and desist from the violations found and "to take such affirmative action . . . as will effectuate the policies" of the Act. This statutory command "vest[s] in the [Board] the primary

[12] If the panel hearing this case concludes that Arrow precludes enforcement of the Board's order insofar as it is based on these findings, we request en banc consideration of this issue only. The Court followed such a procedure in Busby v. Crown Supply, Inc., 896 F.2d 833, 834 n.1 (4th Cir. 1990) (en banc).

responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898-899 (1984). Consequently, a Board remedial order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943).

The Board ordered the Company to reopen the Northumberland plant and reestablish the trailer manufacturing operations existing before the move to Cartersville. (A 1663 n.2, 1692-1693.) The Board noted that the Company had failed to produce evidence that such an order would be unduly burdensome, and that any such evidence that became available after the hearing could be introduced at the compliance stage. (A 1663 n.2, 1693 n.42.)

The Board has held that in cases involving unlawful relocation of operations, the presumptively appropriate remedy is the restoration of the operations at the former location; the employer, to avoid such a remedy, must demonstrate that restoration would be "unduly burdensome." Lear Siegler, Inc., 295 NLRB 857, 861-862 (1989). The Board has applied this remedy to relocations which violated only Section 8(a)(5), as well as to those in violation of Section 8(a)(3). See Elliott Turbomachinery Co., 320 NLRB 141, 143-144, 162-163 (1995); Q-1

Motor Express, Inc., 323 NLRB 767, 768-769 n.10 (1997). This Court has upheld restoration orders for Section 8(a)(3) violations. See NLRB v. CWI of Maryland, Inc., 127 F.3d 319, 335-336 (4th Cir. 1997); NLRB v. North Carolina Coastal Motor Lines, Inc., 542 F.2d 637, 638 (4th Cir. 1976).

The Board reasonably concluded, on the record before it, that the Company had not shown that a restoration order would be unduly burdensome. The Company relies, (Br 38 n.9), on the already incurred relocation expenses, the cost of purchasing the Cartersville plant (which presumably could be recovered if the Company sold the plant), the allegedly less efficient operations in Northumberland (which, as shown above, pp. 34-38, the record does not support), a recession in the trailer industry in 1996 (from which, the Company concedes, the industry is now "in the midst of recovering"), and the Company's loss of some customers as a result of the strike.

The Board has held that where an employer has lost customers, it can comply with a restoration order by reinstating as many of the terminated employees as are needed to serve its remaining customers. We Can, Inc., 315 NLRB 170, 175 & n.22 (1994). Moreover, the Third Circuit has observed that the negative impact of the relocation here "was of [the Company's] making." Hirsch v. Dorsey Trailers, Inc., 147 F.3d 243, 248 (3d Cir. 1998).

Significantly, the Company does not contend that it no longer has the equipment formerly used at Northumberland. Thus, there is no showing that substantial, or any, expenditures on new equipment would be necessary to operate the reopened Northumberland plant. Nor has the Company shown any basis for believing that a reopened Northumberland plant, which had been achieving near-record profits before the strike (Tr 528), would be less profitable than the Cartersville plant, which at the time of the hearing had never had a profitable month (A 1366). The Board and reviewing courts have often relied on the absence of such evidence in finding a restoration order proper. See, e.g., Carter & Sons Freightways, Inc., 325 NLRB 433, 433, 440-441 (1998); O'Dovero v. NLRB, 193 F.3d 532, 538-539 (D.C. Cir. 1999); Mid-South Bottling Co. v. NRB, 876 F.2d 458, 461-462 (5th Cir. 1989). The Board's restoration order would not preclude the Company from closing the Northumberland plant and/or relocating its operations for economic reasons in the future, after fulfilling its bargaining obligation. See NLRB v. Preston Feed Corp., 309 F.2d 346, 352 (4th Cir. 1962).

Cases in which restoration orders were found to be unduly burdensome involved special factors not present in the record before the Board here. Thus, in Coronet Foods, Inc. v. NLRB, 158 F.3d 782, 789 (4th Cir. 1998), this Court found that the employer had not established that the cost of restoration would

cause undue hardship, since it had not shown that it was "in a precarious financial position making it unable to withstand the costs of restoration. . . ." However, the Court found that the employer had established undue hardship because restoration would force it to abandon a mode of operation that had become common in the industry and replace it with one that required experience and expertise which the employer did not possess. Moreover, restoration would not result in the reinstatement of the terminated employees. 158 F.3d at 796-798. There is no comparable showing here that the method of producing trailers at Northumberland was outmoded or substantially inferior to the method used at the Cartersville plant. The other cases cited by the Company, (Br 38-39), involved one or more of the following circumstances not present here: a need for the employer to purchase new equipment at substantial cost to resume operations; a history of losses at the closed facility; an employer with a minimal profit margin or serious financial distress; and loss of the employer's customers as a result of the closure, with no likelihood that restoration would bring them back.

The Company also asserts, (Br 37), that restoration is now impossible because it sold the Northumberland plant after the Board issued its decision.[13] Evidence of such a sale was obviously not before the Board. However, the Board, in its order, specifically noted that evidence of subsequent events that might make the restoration order inappropriate could be introduced at the compliance stage of the proceeding. (A 1663 n.2.)

This Court has held that the compliance stage is the appropriate time to introduce evidence of subsequent events affecting the propriety of a restoration order. NLRB v. North Carolina Coastal Motor Lines, Inc., 542 F.2d 637, 638 n.2 (4th Cir. 1976). The validity of the Board's order is properly addressed here only as of the time it was issued. Mid-South Bottling Co. v. NLRB, 876 F.2d 458, 462-463 n.5 (5th Cir. 1989). To reverse the Board on the basis of evidence never presented to it would be "'incompatible with the orderly function of the process of judicial review.'" NLRB v. Food Store Employees Local 347, 417 U.S. 1, 9 (1974) (citation omitted). Accord NLRB v. So-Lo Foods, Inc., 985 F.2d 123, 129 (4th Cir. 1992).

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[13] Before the Board issued its decision, sale of the plant was prohibited by an injunction issued pursuant to Section 10(j) of the Act (29 U.S.C. § 160(j)) by direction of the United States Court of Appeals for the Third Circuit. See Hirsch v. Dorsey Trailers, Inc., 147 F.3d 243 (3d Cir. 1998). That injunction, by its terms, expired on March 13, 1999. (A 1488, par. 3.)

Enforcement of the restoration order would not subject the Company to contempt proceedings if it has sold the Northumberland plant. Impossibility of compliance would be a defense to any contempt action. See e.g., NLRB v. Castaways Management Inc., 870 F.2d 1539, 1543-1544 (11th Cir. 1989). Moreover, contempt proceedings will not lie against an employer under an order subject to modification in compliance proceedings until and unless the Board finally determines that the original order remains appropriate; a court of appeals enforces the order after such determination; and the employer refuses to comply with the order after it is enforced. We Can, Inc., 315 NLRB 170, 176 (1994).[14]

[14] The procedure followed by the Board in this case is consistent with this Court's views in Ultrasystems Western Constructors, Inc. v. NLRB, 18 F.3d 251, 259 (4th Cir. 1994). As the Board pointed out in We Can, Inc., 315 NLRB at 175-176, it has not deferred a determination of the appropriate remedy until the compliance proceedings, but has made a final determination that a restoration remedy was appropriate on the record before it, while recognizing that subsequent events might render such a remedy inappropriate and providing a mechanism for allowing the introduction of evidence of such events without postponing compliance proceedings indefinitely.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for review should be denied and that the Board's order should be enforced in full.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DORSEY TRAILERS, INCORPORATED	:	
	:	
Petitioner/Cross-Respondents	:	
	:	
v.	:	Nos. 99-1390, 99-1561
	:	
NATIONAL LABOR RELATIONS BOARD	:	Board Case Nos.
	:	4-CA-23996 et al
Respondent/Cross-Petitioner	:	
	:	
and	:	
	:	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 1868, AFL-CIO, CLC	:	
	:	
Intervenors	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below.

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Dated at Washington, D.C.
this 10th day of April 2000